Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No:	**1953/2020**
Heard on:	**28/05/2021**
Delivered on:	**30/07/2021**

In the matter between:

SCARLIWEB (PTY) LTD t/a COOLING SOLUTIONS PROJECTS	First Applicant
ROBURN CONSTRUCTION CC	Second Applicant
and	
SEDTRADE (PTY) LTD (Reg No: 2004/014721/07)	First Respondent
SOL PLAATJE UNIVERSITY	Second Respondent
AECOM SOUTH AFRICA	Third Respondent
THE STANDARD BANK OF SOUTH AFRICA LIMITED	Fourth Respondent

JUDGMENT

MAMOSEBO J

[1] This case involves a tender agreement awarded by the Sol Plaatje University, the second respondent, to the first respondent who is also the

main contractor, Sedtrade (Pty) Ltd, during 2019 that went wrong between the main contractor and its sub-contractors. The tender was for the construction and upgrading of certain civil engineering infrastructure works for the University. This is the return day for the rule *nisi* and the applicants are seeking the confirmation of the rule, which is opposed.

[2] Sedtrade's scope of work entailed the following: to build a combination cricket oval and two rugby/soccer fields and to provide ring mains which carry electricity, data fibre optic, water (potable and fire), wastewater (grey water for irrigation), sewerage and TABS supply to all future buildings on the South Campus of the University.

[3] The applicants submitted their tenders to Sedtrade as sub-contractors to render the aforementioned services, which were accepted and confirmed by appointment letters. On 10 April 2019 Mr Piet Grobler, Construction Manager for Sedtrade, addressed the appointment letter to Scarliweb (Pty) Ltd t/a Cooling Solutions Projects, with contract particulars SX 05 Mechanical/TABS Ring Main SPU South Campus Erf 2155 Kimberley Phase 1. Scarliweb's work was to install Tabs Ring main piping which included testing and acceptance by the Engineer and any remedial work necessary for acceptance but excluded excavation, bedding, and backfilling and the construction of the chambers. The value of the sub-contract is R4,966,713.00 and excludes VAT. On 30 October 2019, a second appointment letter was addressed to the first applicant in respect of Phase 2 of the project to the value of R2,478,956.00 excluding VAT.

[4] The second applicant's appointment letter dated 10 April 2019 with sub-contract particulars specified as the installation of all services (P, NP, FW, Sewer, GW, data, Irrigation, BW, and Rising Main Sewers for SPU South

Campus Erf 2155 Kimberley, Phase 1). The value of this contract is R10,152,294.90 excluding VAT.

[5] The regulatory framework governing the standard upon which the parties operate is the Subcontract Agreement and Provisions of Contract (Fourth Edition, 2011) incorporating General Conditions of Subcontract 2011 for use in connection with Subcontract Works for Civil Engineering Construction.

[6] The General Conditions of the Sub-contract makes provision for the settlement of disputes between the parties. Of importance are Clauses 15.1 and 15.2, which stipulates:

> *"15.1 If any dispute shall arise between the Subcontractor and the Contractor, either during the progress or after the completion of the Subcontract Works, or after the determination of the employment of the Subcontractor under this agreement, as to the construction of this agreement, or as to any manner or things arising thereunder,* ***in the first instance an attempt shall be made to settle the dispute amicably.*** *Should all attempts to settle the dispute or difference amicably fail, such dispute or difference* ***shall be referred to the appointed representative of the Contractor, or the Contractor's site agent if no representative is appointed,*** *for his determination by written decision to the Subcontractor. The said decision shall be delivered within 14 days of the date of request and shall be final and binding upon the parties* ***unless the Subcontractor, within 14 days of receipt thereof, by written notice to the Contractor disputes the decision, in which case the matter shall be referred to an adjudicator.*** *Should the Contractor's representative or site agent fail to deliver his decision within 14 days he shall be deemed to have given a decision rejecting the Subcontractor's contentions or claims. The adjudicator shall be appointed by agreement of the parties failing which by the President of the South African Federation of Civil Engineering Contractors upon request of the Subcontractor.*
>
> *15.2 The opinion of the adjudicator shall be final and binding upon the parties for all disputes involving less than R500,000. For disputes involving amounts in excess of R500,000, should one of the parties, within 28 days of receipt of the opinion, express to the other in writing their dissatisfaction with the opinion, then that party may take the matter to arbitration and/or litigation, provided arbitration and/or litigation proceedings are instituted within a further 28 days.* ***The opinion of the adjudicator shall take immediate effect and shall***

> ***be maintained until such time as it may be overturned by arbitration and/or litigation."*** (own emphasis)

[7] The parties experienced late or non-payments of interim payments for the duration of the agreement. Despite issuing early warning notifications to the main contractor, the breach persisted until correspondence dealing with breaches of their contract followed. In the early warnings a phrase was included to sensitize Sedtrade that the delays or non-payment carries the potential of delaying to meet the completion date of 21 August 2020. The first applicant attached payment certificates dated 30 September 2020 and 5 October 2020 marked "FA14" and "FA15". As appearing in the founding papers, Sedtrade currently owes the first applicant the amount of R798,351.64 (Seven Hundred and Ninety-Eight Thousand Three Hundred and Fifty-One Rand and Sixty-Four Cents) and the second applicant R6,192,252.91 (Six Million One Hundred and Ninety Two Thousand Two Hundred and Fifty Two Rand and Ninety One Cents).

[8] The contract completion date for Phase 2 was 21 August 2020. Subsequent to the completion of the Works, the applicants rendered final invoices and certificates to Sedtrade, the outstanding payments remained unpaid despite demand. What is more absurd is that Sedtrade deducted the entire amount as "Penalty Deduction" without furnishing any reasons for doing so to the applicants.

[9] In the absence of any payment being made the applicants approached this court *ex parte* and on an urgent basis seeking that a rule *nisi* be issued with a return date. On 4 November 2020, Williams J granted the rule *nisi* in the following terms:

1. That condonation be granted for the applicants' non-compliance with the Court's rules pertaining to form, periods and manner of service and that this application be heard as an *ex parte* urgent application in terms of the provisions of Rule 6(12) of the Uniform Rules of Court;

2. that a Rule *nisi* be issued, returnable on 4 December 2020, on which day at 09:30, the respondents should give reasons why the following order should not be made a final order of Court:

   2.1 That the second respondent be interdicted and restrained from directly or indirectly paying any due amounts in relation to contract number: SPU C054 and/or SPU-SX05-ECSC-PM6 for the construction of buildings and infrastructure ring and main Roads within the Sol Plaatje University's premises in Kimberley to the first respondent;

   2.2 That the first respondent be interdicted and restrained from directly or indirectly receiving any due amounts in relation to contract number: SPU C054 and/or SPU- SX05-ECSC-PM6 for the construction of buildings and infrastructure ring main and Roads within the Sol Plaatje University's premises in Kimberley from the second respondent;

   2.3 That the second respondent be ordered to pay any due amounts in relation to contract number: SPU C054 and/or SPU- SX05-ECSC-PM6 for the construction of buildings and infrastructure ring main and Roads within the Sol Plaatje University's premises in Kimberley to the Trust Account of the applicants' attorney of record with details[1] ... to be held until such time as the disputes between the applicants and the first respondent have been finalised.

2.4 That the applicants be granted leave to approach the above Honourable Court on the same papers, duly amplified, for the payment of due amounts into the bank accounts of the applicants upon finalisation of the pending investigation and/or adjudication of the disputes.

3. In the event that payment has already been made by the second respondent into the bank account of the first respondent:

3.1 that the first respondent and/or any person acting under its instruction and authority is interdicted, prohibited and/or restrained from paying such monies from the bank account held by the first respondent, to any person and/or institution, before the disputes between the applicants and the first respondent has finally been resolved either by agreement between them or the duly appointed adjudicator, alternatively an order of the High Court of South Africa, Northern Cape Division, Kimberley;

3.2 that the bank account(s) held by the first respondent and provided to the second respondent for purposes of receiving payments under the awarded tender to which this application relates as referred to in prayer 2.5 *supra,* be frozen to the

[1] I deemed it unnecessary to include the bank details

amount of R6,990,604.55 (six million nine hundred and ninety thousand six hundred and four rand and fifty five cents) and the first respondent be prohibited from paying out or transferring any funds from such account(s) in contravention of this order until such time as the matter may be finalised;

3.3 that the second respondent be ordered to provide the details pertaining to such bank account(s) details provided and details pertaining to payments made or to be made to the first respondent to the applicants or the applicants' attorney of record;

3.4 that the first respondent is interdicted and restrained from requesting the second respondent to pay funds due to the first respondent in respect of contract number: SPU C054 and/or SPU- SX05-ECSC-PM6 into any account other than the account into which the second respondent has been making payments to date of this application (purportedly an account held by the first respondent with the fourth respondent) until such time as the matter has been finalised.

4. The relief claimed in prayers 2.1 to 2.4 or 3.1 to 3.4 whichever be applicable, shall have immediate interim effect;

5. First respondent be ordered to pay the costs of this application, alternatively that the first respondent and such other respondents opposing the application be ordered to pay the costs of the

application jointly and severally, the one paying the other to be absolved;

6. Due to the urgency of the matter, service of the interim order on the respondents may be effected on 6 November 2020 by:

6.1 service of a copy of the interim order by the legal representatives of the applicants alternatively, by the Sheriff of the above Honourable Court, on the respondents on or before 6 November 2020 by means of a fax and/or e-mail; and/or

6.2 by service on a later date, in terms of the Rules of Court.

[10] In terms of the interim order, the second respondent, The Sol Plaatje University, was ordered to pay monies that were due and payable to the applicants under the tender into the trust account of their attorney. The fourth respondent, Standard Bank of South Africa Limited, was ordered to freeze the accounts Sedtrade held with the bank which it (Sedtrade) had provided to the University for purposes of payments under the awarded tender to the amount of R6,990,604.55 (six million nine hundred and ninety thousand six hundred and four rand and fifty five cents). Sedtrade was prohibited from transacting in those accounts until the matter was finalised.

[11] Standard Bank froze Sedtrade's bank accounts completely, which prompted Sedtrade to anticipate the return date of the rule *nisi*. The application served before Tlaletsi JP on 27 November 2020 and extended the rule in the following terms:

1. Extended the rule *nisi* to 22 January 2021;
2. Discharged Clause 3 of the rule *nisi;*
3. **Ordered the parties to report on the extent of the resolution of the dispute on the return date;** and
4. Costs to be determined in due course or upon resolution of the underlying dispute. (Own emphasis)

[12] On 22 January 2021 the matter was postponed by agreement between the parties to 28 May 2021 for the outcome of the adjudication pursuant to a referral thereto. Since the parties could not agree on the adjudicator, the Subcontractor tasked the President of the South African Federation of Civil Engineering Contractors (SAFCEC) with the appointment of one upon request.

[13] Meanwhile, an independent adjudicator, Mr Bryan Westcott, had completed his report on 14 May 2021, which was served and filed on 19 May 2021. The issues of both subcontractors were considered separately. Gleaned from the adjudicator's report, which contains, among others, issues to be determined, prayers by both the contractor and the subcontractor, the statement of claim and the statement of defence, the subcontractor's submissions in respect of the contractor's statement of defence, the adjudicator's deliberations and reasoning, quantum and his decision on the merits and quantum, the following is the adjudicator's decision in respect of both applicants:

13.1 The subcontractor is 11 days late in completing the "Works". He is liable for penalties for this period.

13.2 Interest on this amount is applicable as per the contract document.

13.3 A decision on holding retention money in the Trust account is not in accordance with the subcontract agreement and is beyond the jurisdiction of this adjudicator.

13.4 After considering the contract interpretation questions, my decision is that the subcontract data prevails, and the quantum of the penalty is therefore zero.

13.5 The adjudicator's costs are to be split 50:50 between the parties.

[14] Sedtrade has expressed its dissatisfaction with the adjudicator's decision and has indicated its intention to refer the matter for arbitration, alternatively to approach the High Court. While Sedtrade is urging this Court to hold the adjudicator's decision in abeyance pending finalisation of the intended processes, the applicants seek enforcement of the adjudicator's decision. Essentially, the issue that the applicants are seeking this Court to determine is whether prayer 2.4 of the rule *nisi* can be confirmed or not.

[15] To recap, prayer 2.4 reads: *That the applicants be granted leave to approach this Court on the same papers, duly amplified, for the payment of the due amounts into the bank accounts of the applicants upon finalisation of the pending investigation and/or adjudication of the disputes.*

Mr Grobler SC argued that 2.4 refers to approaching the Court on the same papers, duly amplified. However, after the adjudication report the applicants have not filed an amended notice of motion or a supplementary affidavit for payment to reflect the adjudication and how the figures were arrived at. Counsel further enquired if it will be proper for this Court to confirm the rule *nisi*. Counsel contended that there is a marked departure from the amount claimed by the applicants in the founding papers, page 31 and 32 and in Ms Bester's heads of argument, page 12. What is immediately noticeable is that the figure for certificate 5 is exactly the same, R459,918.18, while the amount for certificate 7 differs with regards to the first three digits: in the founding papers it appears as R177,006.18 while in the heads it is R117,006.18. This may be a typing error in the heads because the same figure of R177,006.18 appears in the payment certificates marked "FA 14" and "FA15". In as far as the second applicant's claim is concerned, the amount appearing in the founding papers for certificate 14 is R4,707,406.68 plus R266,699.00 for soil provided, plus R753,734.08 for materials returned, plus a retention amount of R464,413.15, all to the total amount of R6,192,252.91. Whereas in the heads the amount for certificate 14 is R3,272,397.12 plus retention fees of R283,762.21.

It was therefore contended on behalf of Sedtrade that because the calculations are so markedly different and the applicants cannot correct the figures in the heads of argument, the rule *nisi* should be discharged and the applicants are to be ordered to pay the costs of the application including costs of the previous two appearances.

[16] Ms Bester submitted the following as the correct breakdown of the figures that this Court can order:

Amount due to the first applicant	R 576,924.36
Amount due to the second applicant	R3,272,397.12
Sub Total	R3,849,321.48
Plus Total retention fees to be preserved on Trust	R 421,133.76

Total due	R4,270,455.24
Less amount in Trust	R2,217,160.67
Total	**R2,053,294.57**

[17] The argument, on behalf of Sedtrade, that the failure by the applicants to file an amended notice of motion or a supplementary affidavit after receiving the adjudicator's report should result in the dismissal of the application, does not have merit. The order by Tlaletsi JP was to the effect that the parties were to report on the extent of the resolution of the underlying dispute on the return day. The submission of the adjudicator's report, in my view, complies with such an order.

[18] The applicants, in Prayer 2.4, are seeking payment into their accounts upon finalisation of the pending investigation and/or adjudication of the disputes. The adjudicator's report is clear and unambiguous in terms of the resolution of the dispute between the parties, that the subcontractors should not pay any penalty for their 11 day delayed completion of work. There is no reason why the report does not fulfil the prayer in 2.4.

[19] The fact that there are certificates to confirm actual work done and calculations to be verified before payment, does not support the application for payment not to be effected. The issue is not 'how much' but whether the applicants are entitled to payment or not. Once the answer is in the affirmative, the question of the exact figures, in my view, is an exercise that can be confirmed and finalised by the parties based on the available records.

[20] Once the adjudicator has issued his decision there is no reason for it not to be binding on the parties. A notice of dissatisfaction does not excuse

any party, in this instance Sedtrade, from giving effect to the adjudicator's decision. It is my view that the adjudicator's decision is enforceable despite any future arbitration. Couched differently, the parties to an adjudication decision must give prompt effect thereto unless it has been revised in an arbitration award. See *Stefanutti Stocks*[2]; *Esor Africa*[3]; *Tubular Holdings.*[4] I therefore find that the applicants are entitled to payment of amounts due to them for services rendered.

[21] In as far as costs are concerned there is no reason why they should not follow the result. The costs, which were earlier reserved, should also follow suit.

[22] In the result, the following order is made:

Para 2.4 of the rule *nisi* is hereby confirmed and the first respondent, Sedtrade (Pty) Ltd, is ordered to pay the amounts due to the applicants with costs which includes costs of 27 November 2020 and 22 January 2021.

MAMOSEBO J

NORTHERN CAPE HIGH COURT

For the applicant:	Adv. R Bester
Instructed by:	VHL Attorneys Inc c/o Engelsman Magabane Inc
For the first respondent:	Adv. S Grobler SC
Instructed by:	Raees Chochia Attorneys Inc c/o Haarhoffs Inc

[2] Stefanutti Stocks (Pty) Ltd v S8 Property (Pty) Ltd (20088/2013) [2013] ZAGPJHC249 (23 October 2013)
[3] Esor Africa (Pty) Ltd/ Franki Africa (Pty) Ltd JV v Bombela Civils JV (Pty) Ltd SGHC case no 12/7442
[4] Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd (06757/2013).